



STATE OF ARKANSAS
ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2015-093

December 11, 2015

The Honorable Daniel Shue
Prosecuting Attorney, 12th Judicial District
Sebastian County Courts Building
901 South B Street, Suite 209
Fort Smith, AR 72901

Dear Mr. Shue:

This is in response to your request for an opinion regarding the Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Cases (Uniform Act), codified at Ark. Code Ann. § 16-43-401 *et seq.* You relate that Sebastian County's location on the Arkansas border abutting the State of Oklahoma has resulted in frequent requests under the Uniform Act.

BACKGROUND

You relate the following information as background for your particular questions:

Pursuant to Ark. Code Ann. § 16-43-402, the out-of-state attorney requesting the subpoena prepares a Certificate wherein they provide the name of the Defendant, the court where the proceeding is pending, the offense with which the Defendant is charged, and the name and contact information for the witness. Our office [the local prosecuting attorney's office for the judicial district where the witness lives] then does a Motion for Show Cause Order asking that the Court order the witness to appear at a specified date and time to advise why they should not be ordered to attend as a witness, if they do not agree to testify. Attached to the Motion for Show Cause Order is a Petition to Compel the Attendance of the Out-of-State Witness, an Order for Show Cause Hearing, the proposed Subpoena Directing the Witness to Attend and Testify in a Criminal Jury Trial

in Another State, and a Waiver for the witness to sign if he or she agrees to testify without the necessity of a hearing.

In light of the foregoing background information, you ask the following questions:

Question 1: Ark. Code Ann. § 16-43-402, in the first paragraph, describes the procedure for filing a Certificate from the requesting state—may any person file such Certificate? Alternatively, must the person presenting the certificate be an attorney at law licensed to practice in Arkansas or who has been admitted to practice in Arkansas *pro hac vice*?

Question 2: Ark. Code Ann. § 16-43-402, in the second paragraph, contemplates a hearing with regard to a determination as to whether “the witness is material and necessary,” “that it will not cause undue hardship to the witness to be compelled to attend and testify,” and that the witness will not be subject to arrest or service of criminal or civil process if they travel to the requesting state to testify. Are these independent determinations by the Arkansas judge or must the Arkansas judge defer to the certificate from the requesting state?

Question 3: Must the requesting state pay the witness the standard witness fee and mileage or pre-arrange the witness’s air travel prior to the witness being required to make the trip?

RESPONSE

The answer to your first question, presented in two parts, in my opinion is “no” and “not necessarily.” In my opinion, there are only three classes of people who may invoke an Arkansas court’s processes with respect to the out-of-state court’s certificate described in the Uniform Act: 1) licensed Arkansas attorneys or those who have been permitted to practice in Arkansas *pro hac vice* acting on behalf of the requesting state; 2) the out-of-state defendant who is conducting a *pro se* defense; or, 3) the attorneys who are involved in the out-of-state criminal proceeding. With respect to your second question, in my opinion, the statute requires the Arkansas judge to make these independent determinations. However, in keeping with the general statutory purpose of comity and reciprocity between states, it is my opinion that such a judge should give due deference to the out-of-state court as to the witness’s materiality and necessity. The answer to your third question is “yes,” in my opinion.

DISCUSSION

Before addressing your questions, I believe it will be helpful to provide a brief history and explanation of the Uniform Act. Because compulsory process cannot extend beyond the territory of a state—and a state court cannot require the attendance of a witness who is a nonresident of, and is absent from, that state—the National Conference of Commissioners on Uniform State Laws adopted the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Cases in 1931 (amended in 1936 under the title “Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings”).¹ Arkansas adopted the Uniform Act in 1935,² and it has now been enacted in 49 states, as well as the U.S. Virgin Islands and the District of Columbia.³

The object of the Uniform Act is to promote the enforcement of the criminal laws and the administration of justice in criminal proceedings in the several states.⁴ The Uniform Act enables the courts of one state, through the voluntary cooperation of the courts of other states having the same legislation, to secure the attendance of witnesses from such other states to give testimony in a criminal prosecution or a grand jury or prosecuting attorney’s investigation.⁵

Question 1: Ark. Code Ann. § 16-43-402, in the first paragraph, describes the procedure for filing a certificate from the requesting state—may any person file such Certificate? Alternatively, must the person presenting the Certificate be an attorney at law licensed to practice in Arkansas or who has been admitted to practice in Arkansas pro hac vice?

¹ See 44 A.L.R.2d 732 (1955). Arkansas’s version of the Uniform Act retains the Act’s former title. See Ark. Code Ann. § 16-43-406 (Repl. 1999).

² See Acts 1935, No. 65 (codified as amended at Ark. Code Ann. § 16-43-401 *et seq.* (Repl. 1999)).

³ See Legislative Fact Sheet, The Nat’l Conf. of Comm’rs on Uniform State Laws, found at [http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Attendance of Out of State Witnesses](http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Attendance%20of%20Out%20of%20State%20Witnesses) (last accessed Oct. 16, 2015).

⁴ 81 Am. Jur. 2d *Witnesses* § 34.

⁵ *Id.*

This question raises two initial underlying issues: Who has the *authority* under the Uniform Act to present the certificate, and how is that authority exercised? I believe these issues must be addressed before your question can be answered.

Who has the authority to present the certificate?

It seems clear from the civil nature of the statute⁶ that the authority to present the certificate lies with either the party in the requesting state who has sought the certificate (“the movant”), or someone who is acting on the movant’s behalf.⁷

How is this authority exercised?

The language in the first paragraph of Ark. Code Ann. § 16-43-402—using the passive-voice phrasing of “upon presentation” of a requesting judge’s certificate—gives us no clear guidance on how the certificate is to be “presented.” The Act is simply silent on what “upon presentation” means. Similarly, the Arkansas appellate courts have not provided a definition.

It is reasonable to think, however, that “presentation” includes, at a minimum, filing the requesting judge’s signed certificate, along with any supporting documents, with a court clerk in Arkansas.⁸ This will allow the matter to be assigned to and docketed with the appropriate Arkansas judge.⁹

⁶ The proceedings described in the Uniform Act, despite arising from a criminal proceeding or investigation, are civil in nature and are analogous to a motion to quash a subpoena. *See Codey on Behalf of State of N.J. v. Capital Cities, Am. Broad. Corp., Inc.*, 626 N.E.2d 636, 640 (N.Y. 1993).

⁷ I note that the U.S. Supreme Court has stated that the Uniform Act “make[s] quite clear the procedures to be followed. The *judge of the court of the requesting State* files” the certificate in the responding state. *State of N.Y. v. O’Neill*, 359 U.S. 1, 4, 79 S. Ct. 564, 567 (1959) (emphasis added). The Court does not explain this statement, which was written as *dictum*. Given the civil nature of the proceedings under the Uniform Act, however, I do not read the Court’s statement to rule out the movant’s involvement in presenting the certificate in the responding state.

⁸ *See* Ark. R. Civ. P. 7(b) (2015).

⁹ I cannot say whether “upon presentation” necessarily involves any additional actions. By its terms, the Act does not evoke the typical court proceeding where opposing sides come before a judge to argue their respective legal positions. The Act does not state that the parties from the requesting state or their representatives are required to actually appear before the responding court. *See Vannier v. Superior Court*, 650 P.2d 302 (Cal. 1982). However, my research discovered cases from other states where both the requesting party and the potential witness were

Having determined that 1) the authority to present the certificate lies with the moving party, and 2) “presentation” includes at least filing the certificate with an Arkansas court, the inquiry turns to who can make this filing.

I believe it is clear, as an initial matter, that presenting the certificate to an Arkansas court would constitute the practice of law in this State because the act of filing the certificate is invoking the processes of the court.¹⁰ With this in mind, there are two approaches to filing the certificate that are unquestionably proper. First, because non-lawyers may choose to represent themselves in court,¹¹ a criminal defendant from the requesting state may present the certificate in the responding state in his own behalf. Second, an attorney licensed or admitted to practice in Arkansas may present the certificate for the out-of-state movant. This second approach appears to be the more common practice in other states, according to my research.¹²

Additionally, I believe a third approach should be recognized. In my opinion, one of the lawyers—either the prosecutor or the defense counsel—in the requesting state proceeding may file the certificate in Arkansas (the responding state). This is

represented in the responding court. *See, e.g., Lokk v. CMI, Inc.*, 457 S.W.3d 330 (Ky. Ct. App. 2015).

¹⁰ *See Arkansas Bar Ass’n v. Union Nat. Bank of Little Rock*, 224 Ark. 48, 273 S.W.2d 408 (1954) (holding that “anyone who assumes the role of assisting the court in its process or *invokes the use of its mechanism* is considered to be engaged in the practice of law.”) (Emphasis added). *Accord Stephens Prod. Co. v. Bennett, et al.*, 2015 Ark. App. 617, slip op. at 4 (Oct. 28, 2015) (“Our case law makes it clear that invoking the process of a court of law constitutes the practice of law.”).

¹¹ *See Davidson Props., LLC v. Summers*, 368 Ark. 283, 285, 244 S.W.3d 674, 675 (2006) (noting the well-established principle that non-lawyers may choose to represent themselves in court).

¹² *See generally Forbes v. State*, 793 N.E.2d 1112 (Ind. Ct. App. 2003), *vacated on other grounds*, 810 N.E.2d 681 (Ind. 2004) (stating that “the State,” with no mention of whom, should have “taken” the Indiana court’s certificate to the responding judge in Kentucky); *Wollesen v. State*, 529 S.E.2d 630 (Ga. App. 2000) (noting the local Georgia district attorney filed a motion for the hearing on behalf of the requesting state of Maryland); *In re California for Los Angeles Cnty., Grand Jury Investigation*, 471 A.2d 1141 (Md. App. 1984) (again, noting the state’s attorney for Baltimore City handling the matter on behalf of California). *But see Lokk, supra* note 9, where private Kentucky attorneys represented the Georgia defendants in presenting their certificate. I note that the process your office follows, as described in the above background information, appears to be in accord with that of other states, and I see no problem in continuing its use.

because the Arkansas rules governing lawyers’ conduct make certain exceptions to the general prohibition on the unauthorized practice of law for lawyers who are admitted in another United States jurisdiction and are in good standing. Such lawyers may provide legal services in Arkansas on a “temporary basis” in certain circumstances:

A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice.¹³

In my opinion, the exceptions emphasized above would permit the certificate’s filing in Arkansas by either the out-of-state prosecutor or the defense counsel from

¹³ Ark. R. Prof. Conduct Rule 5.5(c) (emphases added). *But see* Ark. R. Gov. Admis., Rule XIV (Practice By Comity) (stating that “any trial court *may require* such nonresident attorney to associate a lawyer residing and admitted to practice in the State of Arkansas upon whom notices may be served and may also require that the Arkansas lawyer associated be responsible to the court in which the case is pending for the progress of the case, insofar as the interest represented by the Arkansas lawyer and the nonresident lawyer is concerned,” and that such comity will not be extended to any lawyer from a state that does not afford similar comity to Arkansas attorneys) (emphasis added).

the requesting state.¹⁴ This is because of the unique nature of the proceedings in the responding state’s court as described above, where the “legal services” are going to be limited, and where no out-of-state lawyer is attempting to represent an Arkansas resident’s interests.

In sum, I conclude that there are three classes of people who may invoke an Arkansas court’s processes with respect to a requesting court’s certificate seeking a witness located in Arkansas: 1) licensed Arkansas attorneys or those who have been permitted to practice in Arkansas *pro hac vice* acting on behalf of the requesting state; 2) the out-of-state defendant who is conducting a *pro se* defense; or, 3) the attorneys who are involved in the out-of-state criminal proceeding.

Question 2: Ark. Code Ann. § 16-43-402, in the second paragraph, contemplates a hearing with regard to a determination as to whether “the witness is material and necessary,” “that it will not cause undue hardship to the witness to be compelled to attend and testify,” and that the witness will not be subject to arrest or service of criminal or civil process if they travel to the requesting state to testify. Are these independent determinations by the Arkansas judge or must the Arkansas judge defer to the certificate from the requesting state?

In my opinion, an Arkansas appellate court, if faced with this question, would hold that the language of the statute requires the Arkansas judge to make each of these determinations independently. However, the appellate court, in my opinion, would also likely hold that the judge should give due—but not unquestioning—deference to the requesting court as to the materiality and necessity of the witness to the out-of-state criminal proceeding. This is in line with the statutory purpose of comity and reciprocity between the states that have adopted the Uniform Act.¹⁵

The scheme relevant to the above question is found in Ark. Code Ann. § 16-43-402. The Act contemplates two court proceedings regarding a potential witness located in Arkansas before a summons can issue for the witness’s attendance at

¹⁴ Comment 5 to Rule 5.5 states that the four exceptions listed in subsection (c) are generally permissible because they are “circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts.”

¹⁵ See Ark. Code Ann. § 16-43-405 (Repl. 1999) (stating that the Uniform Act “shall be so interpreted and construed so as to effectuate its general purpose to make uniform the law of states which enact it”).

another state’s criminal proceeding. The first is held before the requesting judge where the proceeding is pending. The requesting judge must determine whether the witness in Arkansas is material to that state’s proceeding.¹⁶ If that judge is persuaded by the party seeking the witness that the witness is material to the proceeding, then that judge will set out his or her findings—including specifying the number of days the witness will be needed—in a certificate.¹⁷

The second proceeding is held before an Arkansas judge in the county where the witness is located.¹⁸ The Act states in this regard that “upon presentation of such a certificate to any judge of a court of record in the county where such person is, such judge *shall fix a time and place for a hearing*, and shall make an order directing the witness to appear at a time and place certain for the hearing.”¹⁹ According to the Act, the Arkansas judge then must make three determinations: 1) that the witness is material and necessary; 2) that it will not cause undue hardship to the witness to be compelled to attend and testify, and; 3) that the requesting state’s laws and those of any other state through which the witness may have to pass provide the witness protection from arrest and service of process.²⁰ If the Arkansas court is satisfied as to each of these issues, then the judge shall issue the summons, with a copy of the requesting court’s certificate attached.²¹

The issue of deference referenced in the question you have posed is with respect to the requesting court’s certificate that the witness is material to that state’s proceedings. The Uniform Act states that the certificate is “prima facie evidence of all the facts” contained in it.²² My research indicates, however, that jurisdictions differ as to the level of deference the requesting court’s certified

¹⁶ See Ark. Code Ann. § 16-43-402 at ¶ 1.

¹⁷ See *id.*; see also 81 Am. Jur. 2d *Witnesses* § 42.

¹⁸ See Ark. Code Ann. § 16-43-402 at ¶ 2.

¹⁹ *Id.* (emphasis added).

²⁰ See *id.* But see *Lokk, supra* note 9, 457 S.W.3d at 338 (holding that the responding court in Kentucky was not required to make these determinations when the requesting court’s certificate was deficient on its face).

²¹ See Ark. Code Ann. § 16-43-402 at ¶ 2.

²² *Id.*

findings should be given regarding a witness’s materiality. On the one hand, a few jurisdictions have afforded a requesting court’s certificate significant, if not total, deference. These jurisdictions view the conclusions contained in the requesting court’s certificate as alone sufficient to support a finding of materiality and necessity.²³ This view holds that to essentially “require the requesting state to again litigate in our courts its judicial finding that the witness is material and necessary would not promote the purpose” of the Uniform Act.²⁴

On the other hand, other jurisdictions hold that while the certificate may be *prima facie* evidence of the *facts* contained therein, the requesting court’s *conclusions* are not entitled to *prima facie evidentiary* value. Thus, if the responding court deems the facts in the certificate to be insufficient, then the determination of materiality must be supported by other facts in evidence.²⁵ Under this view, the ultimate determination of whether a person is a material and necessary witness to the out-of-state proceeding is made by the responding court.²⁶

In light of the Act’s requirements as stated above, this latter view is the one Arkansas courts most likely would adopt, in my opinion. As stated above, Arkansas law requires the court to make its own determinations as to the witness’s

²³ See *In re Cooper*, 22 A.2d 532 (N.J. 1941) (stating that “there is abundant proof that Cooper is a material witness. Such was certified to be the fact by the judge conducting the trial of the cause; and the act renders his certificate ‘prima facie evidence of all the facts stated therein...’” and that “the question of the materiality of the evidence is largely for the decision of the court in which the cause is being tried, for it depends somewhat upon the law of that jurisdiction and the evidence adduced on the trial of the issue”).

²⁴ *Ex parte Armes*, 582 S.W.2d 434, 438 (Tex. Crim. App. 1979) (stating further that “this Court’s interpretation of [the Texas Uniform Act] should reflect the same deference to the judicial determinations made in sister states that we would expect to be given to judicial determinations made in the courts of this state.”).

²⁵ See, e.g., *New York v. Wagner*, 398 N.E.2d 372 (Ill. App., 1st Dist. 1979).

²⁶ See *Davenport v. State*, 711 S.E.2d 699, 702 (Ga. 2011) (“It is the [responding] judge who must decide whether the sought-after witness is necessary and material, not the requesting court...”); *New Jersey v. Bardoff*, 459 N.Y.S.2d 878 (N.Y. App. Div. 1983) (stating that “the court of the state where the witness resides is obliged to determine for itself whether the witness is material and necessary”); *In re Stoddard*, 470 A.2d 1185 (Vt. 1983) (holding that it was error for the trial [responding] court to merely accept the requesting court’s certificate as dispositive on the issues of materiality and necessity and of undue hardship without making its own independent findings); see also *Matter of McAuley*, 408 N.E.2d 697 (Ohio Ct. App. 1979).

materiality and necessity to the out-of-state proceedings, whether such attendance would cause an undue hardship to the witness, and whether the witness would be free from arrest and service of process. But, I believe the court would also be mindful of the statutory purpose of comity and reciprocity between the states that have adopted the Uniform Act, and thus would give the requesting judge’s certificate due—but not necessarily unquestioning—deference.

Question 3: Must the requesting state pay the witness the standard witness fee and mileage or pre-arrange the witness’s air travel prior to the witness being required to make the trip?

I understand you to be asking whether the out-of-state party (whether it be the state or the defense) requesting an Arkansas witness must pay the standard per diem witness fee and either the witness’s mileage or actual expense for travel (plus lodging and meals) as established in Ark. Code Ann. § 16-43-402 *before* the witness is required to travel to that state. The answer to that question is “yes,” in my opinion. The fourth paragraph of the statute reads in pertinent part: “If the witness, who is summoned as above provided, *after being paid or tendered* by some properly authorized person the sum of...”²⁷ This language clearly indicates that the witness is to be paid these sums before being obliged to attend.

Sincerely,


LESLIE RUTLEDGE
Attorney General

²⁷ Ark. Code Ann. § 16-43-402 at ¶ 4 (emphasis added). *See also Bussard v. State*, 300 Ark. 174, 778 S.W.2d 213 (1989) (noting that the state forwarded witness fees to the Missouri court in order to secure a Missouri resident as a witness); *State v. Harris*, 615 P.2d 363 (Or. Ct. App. 1980) (noting Oregon’s Uniform Act requires the fees and expenses to be tendered in advance).